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BOOK REVIEWS

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BOOK REVIEWS

THE MORAL DECISION; RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW. By Edmond Cahn. Indiana University Press, 1955. Pp. ix, 342. \$5.00.

One of the most original and penetrating writers in American legal literature today is Edmond Cahn.¹ His background of twenty-three years in active law practice in New York City gives him a wise practical insight. During that period he became a legal theorist of outstanding ability,² and since 1950 he has devoted himself to teaching constitutional law and jurisprudence and writing on legal subjects.

His latest book is not intended only for lawyers and students of the law. It is addressed to "any literate individual who is troubled by the moral confusion of the times," which I would suppose includes all of us who read the newspapers, not to mention the modern novel. But this certainly is a book that will particularly interest and instruct the thoughtful lawyer.

"What moral guides can be found in American law?" Professor Cahn asks. Morals and ethical thought are sources of the law. The traditional statement of the police power of legislative bodies conceded that at the very least they could deal with matters of "health, safety and morals." The corpus of the judge-made common law bears many indications of concern with moral problems, as indicated by such words and phrases as fraud, malice, fault and good faith. But it is apparent that law and morals are not identical. The law deals with many problems that do not have moral overtones, that are, as Professor Cahn says, "morally neutral." Conversely, the phrase found in many judicial opinions that a party may have "a moral, but not a legal, right" indicates that the law does not always accept the moral answer as controlling. Since the law so often deals with moral problems, Professor Cahn suggests that the legal resolution of such questions might be instructive to moral and ethical theory. Thus the law repays its debt to morals and becomes a source for ethical thought.

Part I of the book is relatively short, and deals with the theory of moral decision. Professor Cahn is one of those who thinks that the proof of the moral make-up of an individual lies in his response to

1. Professor of Law, New York University.

2. Since 1944, Mr. Cahn has contributed the chapter on Jurisprudence to the ANNUAL SURVEY OF AMERICAN LAW.

a specific moral problem. The goal of moral thought is to produce the correct moral decision. The human characteristics which respond to a situation and contribute to the moral decision may be regarded as "the moral constitution". The moral constitution consists of our proneness to dramatize the events of our lives, our capacity to project this feeling to the similar problems and predicaments of others, and our sense of wrong, an instinctive reaction, part rational, part physical, to an act of moral wrong. These being the elements of the moral constitution, it is apparent that the concrete case provides the necessary setting for its operation. Only the concrete case can be dramatized. Only here is the moral constitution faced with the responsibility for making a binding decision. Only to a specific set of facts can the sense of wrong respond. In short, the lawyer's emphasis on the existence of a "case or controversy" provides an insight that moral theory should find useful.

Here is where Professor Cahn feels that the experience of the law should aid the moralist. Too often ethical thought is "Utopian;" it is so far removed from the concrete moral problem as to offer little aid in providing a clear solution. On the other hand, the courtroom often presents moral problems in a highly specific setting. The courtroom dramatizes the problem, and it demands a solution, so that its treatment is responsible, not Utopian. Legal experience can be useful in two ways: it poses many concrete moral problems on which ethical theory can work; and it offers the law's solution to those problems.

Parts II and III contain the law's lessons for morals, in substantive and procedural law respectively. Here each type of problem is introduced by a brief summary of an actual litigated case. These chapters are well worth the lawyer's careful reading if only for their insight into the legal problems involved. But the emphasis is not on the legal analysis of the case. Rather each case is used as a springboard for speculation about an area of moral problems. In Professor Cahn's language, these cases were chosen for their "prismatic qualities," for their ability to reveal a spectrum of moral problems. The author's choice of cases is unerring.

These two Parts, which comprise the bulk of the book, are delightful reading for the lawyer. For instance, the first case is *United States v. Holmes*.³ The ship *William Brown* struck an iceberg 250 miles from Newfoundland, and the first mate, seaman Holmes and six other seamen, and 32 passengers piled into a leaky long-boat built

3. 26 Fed. Cas. 360 (C.C.E.D. Pa. 1842).

to hold only half their number. The situation was desperate as the ship slowly began to sink. The first mate ordered the crew to throw all male passengers overboard. Fourteen passengers were thrown into the cold waters of the North Atlantic, and the long-boat was saved. Seaman Holmes was indicted for murder. Using this case as a springboard, Professor Cahn asks, what is the value of a human life in the eyes of the law? Jurisprudence has offered three solutions to the *Holmes* problem: the ruling of the trial judge in *Holmes* trial, that, if time permitted, lots must be drawn so that chance could decide the vexing question; the suggestion that the whole question of whether the action was excused by the circumstances be left, as are so many hard legal problems, to a jury; the thought that while possible hope of rescue remains, no life could be sacrificed. Cahn rejects all three, deciding that in such a case, where the "morals of the last days" apply, they all must wait and die together, unless brave volunteers give their lives to lighten the boat. Here as elsewhere in the book the author reveals the bold originality of his thinking. The solution does not strike one as the most likely to insure the perpetuation of the species, but it is not unlike the answer given by the three famous Army chaplains, who gave their lifebelts and went down with a troopship that others might live.

In this fashion, Professor Cahn goes through the whole range of legal experience with moral problems. The material dealing with the domestic relations is superbly treated. He begins with the right of a child to be respected as a human being having his own peculiar characteristics, as illustrated by the turntable "attractive nuisance" cases.⁴ The moral problems of family life, of extra-marital sexual relationships, and of divorce and annulment are analyzed. Professor Cahn indicts persuasively on moral grounds the legal doctrines permitting monetary compensation for "heart-balm" cases — breach of promise of marriage, alienation of affections and criminal conversation. He also indicts in strong terms the doctrine of recrimination as a defense to a suit for a divorce. The judicial process is sullied by the former type of case, and is not competent to deal with the latter, he asserts. Invoking the analogy of separation of powers in constitutional law, he shows that whether a marriage should continue is a problem often better handled by an administrative than a judicial tribunal. The dramatization in an adversary proceeding of marital infidelity and strife can only destroy whatever possibility might remain of saving the marriage.

4. *Railway Co. v. Stout*, 17 Wallace 657 (1873) is cited.

Chapters dealing with the conduct of business and business with government explore a broad range of problems. Fraud and misrepresentation, business ethics and the moral implications of cheating on income taxes are discussed. The leading case of *Tuttle v. B.*⁵ in which the defendant, activated solely by malice, opened a barber shop to put the plaintiff's shop out of business by ruinous competition, and the Minnesota mortgage moratorium case,⁶ are brilliantly employed to develop a theory of the moral use of the power that comes with command over wealth. Judge Cardozo's famous decision in the *Wagner* case⁷ — "Danger invites rescue" — leads to a discussion of the story of the Good Samaritan and its moral lessons. The part dealing with the substantive law closes with a chapter on death, so that the whole range of life has been explored.

The closing part deals with the moral lessons of adjective law. Again litigated cases are summoned to pose the problems. The great lesson which American procedural law has for morals is summed up by Professor Cahn in the phrase "due process of moral decision." The essentials of due process of law, as developed in constitutional decisions, apply to the making of the moral decision. No one should be accused unless he has notice before he acts that his act is violative of a recognized moral standard. He must be told that he is accused and permitted to present his evidence and argue his case. The tribunal must be unbiased, and if the accusation is grave, the accused is entitled to counsel. Irrelevant, incompetent and immaterial evidence must be evaluated as such. All these considerations are considered applicable to moral due process, save possibly the requirement of counsel. Of course, the moral decision is made within an individual; the judge-jury division of function is lacking. But that man must evaluate the evidence, and by evaluating incompetent evidence in terms of its materiality, must give the evidence the cool appraisal that is given by a good judge.⁸

Professor Cahn uses the decree in the *Segregation Cases*⁹ to introduce discussion of compromise and negotiation. Given the de-

5. 107 Minn. 145, 119 N.W. 946 (1909). Professor Cahn uses only the initial to designate the litigant whose moral conduct is at issue in the litigation.

6. Home Bldg. & Loan Assoc. v. Blaisdell, 290 U. S. 398 (1934).

7. Wagner v. International Railway Co., 232 N.Y. 176 (1921).

8. An example in the law in which something strikingly similar to "due process of moral decision" as described by Professor Cahn is employed in the procedure for summary courts-martial, in the Uniform Code of Military Justice, Act of 5 May, 1950. A summary court under the Act is charged with acting as prosecutor, defense counsel and judge, and must carefully keep its functions separate in order to grant what is called "military due process" to the accused.

9. Brown v. Board of Education, 347 U.S. 483 (1954).

cision on the substantive law,¹⁰ that decree is what the diplomats would call a conciliatory decision. The provision in the decree that adjustment will be gradual and will take into account varying local needs provides a framework for negotiation. Professor Cahn's discussion of the techniques of negotiation is witty and instructive.

The federal naturalization statute requires an applicant to show that for the five years immediately preceding his petition, he has been "a person of good moral character." Can a person who has committed a mercy killing within that period meet the statutory test? How can a judge decide whether a person is of "good moral character"? Professor Cahn uses a case raising these problems¹¹ to present his view that the making of the moral decision is the responsibility of each of us — "The act of individual judgment must belong to him who bears the name of judge." He takes to task one of the most profound thinkers in American law, Learned Hand, for his dissenting view in that case, that "the generally accepted moral conventions current at the time," and not the judge's own responsible views, provide the material for decision. In the legal as in the moral forum, the author feels that the responsibility of judgment is personal.

The layman's caricature of the lawyer is not complimentary. Even the intelligent layman frequently is suspicious of the role of the lawyer in our society, and afraid of involvement in litigation. Someone must lose in every lawsuit. The layman too often is reminded of the summons, the complaint and the execution. Seldom does he think of the great gifts of order and justice that the law is attempting to give to society. A book like Professor Cahn's serves the legal profession well by reminding the reader that many jurists, lawyers and law teachers are deeply concerned with the moral and social implications of their profession, that the law has had a great deal of experience with moral problems, and that it has resolved many of them in a wise and enlightened manner.

CHARLES H. RANDALL, JR.*

10. Professor Cahn has discussed at length some of the substantive aspects of the decision in 1954 ANNUAL SURVEY OF AMERICAN LAW, Jurisprudence, pp. 809 to 828.

11. R——— v. United States, 162 F. 2d 152 (2d Cir. 1947).

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LIFE AND LIMB. By Robert Wallace, Doubleday & Co., Inc. 1955.
Pp. 250. \$3.50.

Life and Limb should not be advertised as a printed book, for in intellectual reality, it is an etching. It is etched with the acid of sarcastic (see page 44), slanted journalism, kissing Melvin Belli on each cheek, feasting with him to gain from his own lips some of the light that shines forth from his soul, but reflecting that light in a vicious cast. The book is acidulous and burning where its words fall harshly upon the great man whose biography it purports to be.

Actually, this book, though a great book, and a magnificent example of clarity and prose, of biting sarcasm and scholarly research, is, wittingly or unwittingly, a terrific propaganda blast to help insurance companies keep more of the premiums they collect for themselves rather than distribute those premiums in payment to persons who are injured.

The first fifty pages form an apologia for insurance companies with scant breath wasted on the cries of the tortured bodies racked by chromium-plated bumpers or crushed by hurtling wheels. After fifty pages the book gets down to its real purpose of chronicling the life of Melvin Belli, a great trial lawyer. Still, the anecdote of the stuffed quail, though very funny, does hardly seem designed to cast either credit or respect upon anybody.

Aghast at the merciless innuendos and Parthian shots of this modern journalistic iscaritism, I called Melvin Belli when partway through the book to learn his reaction to this attack on him as a man. Incensed myself at its unfairness, I expected Belli to be up in arms, but, as is characteristic of a big man, he generously said, "An attack upon me is unimportant. Perhaps the book will serve to educate the public to the great need for more adequate awards, more closely to compensate men and women who suffer for wrongs done to them. If the book serves that purpose, I shall be glad."

He tried to stop its publication by injunction, but failed.

The book cannot but be provocative. It excites. It fills one with fear as one imagines one's self a defendant, but it also makes one glad such champions as Belli live and serve, in case one should ever be injured.

A vignette from the text which illustrates Belli's greatness is this from page 62:

Ernie Smith, a young colored boy who had been serving a term in San Quentin for a felony, got into a fight in the exercise yard of the prison, killed a man, and was indicted for mur-

der. For all intents and purposes Smith was in the gas chamber waiting for the cyanide pellets to drop when Belli came along.

Belli interviewed Smith in the office of the captain of the guard at San Quentin. 'I did it in self-defense,' Smith said. 'I knocked him down and then I kicked him a couple of times because he had a knife and was going to throw it at me.'

Belli asked Smith how he expected a jury to believe that the dead man had actually had a knife—in prison—and was amazed to discover that most of the convicts in San Quentin carried knives. 'That's right,' said the captain of the guard. 'We let them have them—up to a certain length. We take the big ones. Look.' He opened a desk drawer and showed Belli a mass of more than a hundred knives that had been confiscated from the prisoners.

'Before the trial I served a *subpoena deces tecum* on the captain, ordering him to come to court and bring his drawer of knives,' Belli says. 'I offered the drawer in evidence, and as I was carrying it past the jury a hell of a thought struck me. I knew my whole case was in that drawer. Every argument I had was in there. That boy was going to live or he was going to die because of what was in that drawer, and so I suddenly stopped, and I dropped the damned thing, and I spilled a hundred knives all over the floor. They were the meanest-looking knives you ever saw, made of broken saw blades and files with tire-tape handles. The jurors took one look and they *knew* it was self defense. Demonstrative evidence. I might never have sold them on the idea that Smith was trying to save his own life when he killed the other boy if I had just called witnesses and talked and let them peek into the drawer. But when I dropped it, I *proved* it.'

Belli has been "proving it" since with verdicts that are amongst the largest in the history of personal injury and death litigation.

At page 169, the biographer expounds his own philosophy: "Society cannot and should not compensate every careless or accident-prone individual who insists on jaywalking, thrusting his head out the window of a moving train, moving against a red light, or otherwise laying himself open to injury. Even in cases less clearcut, the doctrine fairly applies."

Though the author speaks those sentiments, giving them gratuitously in this "biography," *Life and Limb* does in fairness report that impartial and fair-minded jurors, presumably with no advertising space

to sell to insurance companies, have seen fit over the years to award to Melvin Belli's clients many, many verdicts of \$100,000.00 or more for pain, suffering, death, disablement. It is not suggested anywhere that the disabled or crushed humans could afford to lose their lives or limbs; it is just made to seem awful that they employed Belli to help them in their terrific fights for adequate awards.

Will you think the awards have ever been "adequate" for the agony? To learn the answer to that, you will have to read this maddening but fascinating book. Don't start it unless you cancel your appointments for a couple of hours, for you will not want to put it down till the last tumultuous paragraph has cascaded through your mind, mores, and morality.

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